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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT EDWARD LEE, Defendant and Appellant.	G034767 (Super. Ct. No. 04ZF0056) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert R. Fitzgerald, Retired Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Alisa A. Shorago, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jennifer Jadovitch and David Delgado-Rucci, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Robert Edward Lee appeals from the judgment sending him to prison for 33 years to life after a jury found he committed an aggravated assault on Dwight Storay, his parole officer, battered that officer—inflicting serious bodily injury—resisted and

deterred an executive officer and made criminal threats. (See Pen. Code, §§ 69, 243, subd. (d), 245, subd. (c), 422.)[1] The jury also found he personally inflicted great bodily injury when he assaulted Storay. (See § 12022.7, subd. (a).) In a bifurcated court trial, the court found Lee had two prior "strike" convictions, a prior serious felony conviction and two prior prison terms. (See §§ 667, subds. (a), (d) & (e), 667.5, subd. (d).)

On appeal, Lee makes two claims: (1) The trial court erred in its instruction regarding the mental intent required for the resisting-an-executive-officer charge; and (2) it erred when it failed to hold a *Marsden*[2] hearing following the verdict. We affirm.

FACTS

Storay was Lee's parole officer for two-and-a-half years. Lee knew he had to inform his parole officer of his residence and whereabouts; in accordance with that requirement, Lee told Storay he was living at the Orange County Rescue Mission in Santa Ana. Storay appeared at the Rescue Mission to check on Lee but could not locate him. He then proceeded to Lee's mother's home and again could not locate him. Returning to the Rescue Mission, Storay spotted Lee in the back pews, slumped over and apparently sleeping during the early morning church service. Storay asked Lee to step outside and speak with him.

Outside, Lee became enraged as soon as he learned that Storay had visited Lee's mother. Lee began yelling and clenching his fists. He demanded to know who was lying about him. Trying to calm him, Storay suggested they take a walk, striding ahead and hoping Lee would follow. Initially hesitating, Lee eventually approached Storay but appeared angry, telling Storay that he was tired of the officer telling him what to do. Storay attempted to de-escalate the situation, informing him that things were not that

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[1] The jury acquitted Lee of another charge, assault with a semiautomatic firearm on a peace officer, a violation of Penal Code section 245, subdivision (d)(2).

All further section references are to the Penal Code unless otherwise stated.

[2] See *People v. Marsden* (1970) 2 Cal.3d 118.

serious. Storay then put out his left hand to place a comfortable space between the two of them. Lee took offense at this, saying "what are you going to do, kill me?" Storay again tried to calm him, suggesting he just relax. Instead, Lee took another step at him, his hand in a fist, saying, "are you going to shoot me?" Storay then ordered him to back up. Lee exhaled; so did Storay, who—thinking the worst was over—turned towards his car. Suddenly, Lee said, "I'm going to kill you[,]" and threatened him with all kinds of bodily injury.

As Storay turned to confront the danger, Lee socked him in the face, pummeling his head with his fists repeatedly before Storay was able to engage him in close wrestling. Lee lunged for Storay's sidearm, knocking him backwards to the ground and then straddling the officer while grabbing for the firearm. Storay struck back, holding one of Lee's hands. Lee nonetheless managed to unholster the gun, stand up and aim it at the officer, pulling the trigger. Obstructed by the safety which was on, Lee was distracted long enough for Storay to kick the gun out of his hands. Enraged, Lee kicked Storay several times in the stomach and then ran into the Rescue Mission. Re-holstering the weapon, Storay called for urgent assistance on his cellular phone.

When the responding officers arrived, they found Lee seated inside the Rescue Mission. They placed him in custody and escorted him outside where he spotted Storay. Screaming at him, Lee taunted Storay with "I kicked your ass[]" and "I should have killed you, motherf__ker!" As he was placed into the patrol car, he yelled "I took his gun away from him, took it right out of his holster. I'll kill you…!"

In his interview with the police officers, Lee admitted that he "kicked his ass, kicked it good!" Explaining that Storay had ordered him to get a job and not visit his mother, he was so angry that he "started telling that f__ker what I [Lee] wanted." According to Lee, Storay then put his hand on his holster, threatening to shoot Lee if he did not comply with Storay's orders. As he related these events, Lee became visibly agitated, with his voice escalating in pitch, speed and volume. When asked about the

gun, Lee admitted he took it away from Storay but contended he threw it away and never used it against Storay.

Storay received medical attention for three facial bone fractures and a deviated septum; the injuries required multiple surgeries on his nose and palate. The breathing and visual problems he suffered from the injuries continued even through the time of the trial, eight months after the incident. He still was unable to return to work.

DISCUSSION

The *Marsden* Issue

After the verdict was returned, Lee turned on his appointed counsel, accusing him of causing Lee to be returned to prison. Lee complained that he had done nothing wrong, saying "[t]he man threatened to shoot me. I don't have a right to defend myself? I gotta go back to prison. I have been in and out prison for 14 years." Lee "fired" the attorney, stating "I don't want this man." Lee never gave any other reason for a conflict with his attorney other than the jury's verdict was not acceptable to him. Nonetheless, he now contends—citing *People v. Smith* (1993) 6 Cal.4th 684—the trial court was required under *People v. Marsden* (1970) 2 Cal.3d 118 to conduct an ex parte hearing to determine if counsel should be relieved and replaced with new appointed counsel who could then bring a motion for new trial on the basis of incompetency of trial counsel.

Under *Marsden* and *Smith*, a trial court is required to conduct a closed hearing to permit a defendant to fully express his or her reasons for dissatisfaction with present counsel's competency and a desire for new appointed counsel. In that hearing, the burden is on the defendant to show the counsel's failure to effectively represent the defendant *or* that an irreconcilable conflict has developed between counsel and defendant. (See *People v. Earp* (1999) 20 Cal.4th 826, 876.) However, if the issue arises after verdict and relates *exclusively* to courtroom conduct or tactics, the trial court may resolve the issue of the need for replacement counsel *without* appointing new counsel.

(See e.g., *People v. Diaz* (1992) 3 Cal.4th 495, 573-575.) Finally, a trial court's denial of the request for substitution of appointed counsel due to incompetency is reviewed under the deferential abuse-of-discretion standard. (*Earp, supra,* 20 Cal.4th at p. 876.)

Lee never expressed his opinion that appointed counsel was incompetent. He expressed his extreme disagreement with the jury's verdict and "fired" counsel because he felt—contrary to the jury's determination—that he (Lee) had engaged in legal self defense. At no time did he express any doubt as to counsel's performance as an attorney, including at the later court trial on the prior convictions. And it is most telling that a motion for new trial due to counsel's incompetency was never raised.

Lee responds that the trial court's failure to hold a closed hearing barred him from expressing his distrust in counsel's performance. Without the hearing, there could be no record of his belief in counsel's incompetency. (See *People v. Hill* (1983) 148 Cal.App.3d 744, 755.) But in all the cases invoking *Marsden*, the defendants were able to express their distrust or disapproval of their counsel's performance by simply stating—for example—that the defendant's "rights have not been protected by . . . the three lawyers that [the defendant] had[,]" (*id.* at p. 750), the defendant's "belie[f was that] his counsel had inadequately represented him at trial[,]" (*People v. Diaz, supra,* 3 Cal.4th at p. 573), the defendant's "complaint that he had asked lead counsel [] to investigate 'something,' but that [counsel] had 'made himself unavailable,' [thereby] recklessly [blowing his] chance of using that witness . . . [,]" (*People v. Earp, supra,* 20 Cal.4th at p. 875-876), the defendant's "*written* motion requesting a new trial, setting forth claims under penalty of perjury that his attorney refused to let him testify, and failed to subpoena, or failed to call, several material witnesses, the materiality of whom he set forth in detail[,]" (*People v. Kelley* (1997) 52 Cal.App.4th 568, 579 [italics added]), or the defendant filed "a motion for substitution of counsel 'due to inadequate representation of counsel,' citing *People v. Marsden* [*supra,*] 2 Cal.3d 118." (*People v. Smith, supra,* 6 Cal.4th at p. 688.) Lee failed to meet even this basic test. Instead, he expressed dislike

of his attorney because the jury decided against his version of events, *not* because his attorney had failed to competently represent him.

Lee responds by invoking language in *People v. Lucky* (1988) 45 Cal.3d 259, at page 281, where in dictum the court summarized "that a trial court's duty to permit a defendant to state his reasons for dissatisfaction with his attorney arises when the defendant *in some manner moves to discharge his current counsel.*" (Italics added.) However, the very next sentence of the court's opinion clarifies that dictum: "The mere fact that there appears to be a difference of opinion between a defendant and his attorney over trial tactics does not place a court under a duty to hold a *Marsden* hearing." (*Ibid*.)

In *Lucky*, appointed counsel informed the trial court that the capital defendant "was considering the idea of retaining private counsel in lieu of [himself, and, counsel argued], the court had a duty under [*Marsden* . . .] to give defendant an opportunity to state fully the grounds for his dissatisfaction with appointed counsel." (*Id.* at p. 280.) Not so. The appellate court, in rejecting Lucky's argument, noted that a defendant must make "at least some clear indication . . . that he wants a substitute attorney. The record in this case reveals no such indication by defendant." (*Id.* at p. 281, fn. 8.) The case held that a full *Marsden* hearing was not warranted when a capital defendant expressed a desire to *retain* new counsel in lieu of *appointed* counsel, even though the defendant in that expression mentioned a conflict on trial tactics. (*Id.* at p. 281.)[3]

Lee was angry at the jury's verdict. He projected that anger at appointed counsel. That expression did not trigger a right to a *Marsden* hearing to determine if counsel was incompetent, necessitating a substitution for purposes of bringing a motion for new trial due to ineffectiveness of trial counsel under these circumstances.

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[3] We acknowledge our recent opinion of *People v. Munoz* (filed April 17, 2006; G034265 [modified April 20, 2006]) __ Cal.App.4th __, and emphasize the distinction between a defendant's right to relieve *retained* counsel due to tactical conflicts and the lack of such a right when it is *appointed* counsel with which the defendant has a dispute.

Jury Instruction

Lee contends the trial court erred in its sua sponte responsibility to instruct the jury on the elements of the offense of resisting an executive officer in the performance of his duty. Specifically, he argues the trial court mistakenly informed the jury that this offense was a general intent crime, not the specific intent crime which it is. (See *People v. Patino* (1979) 95 Cal.App.3d 11, 27.)[4] He extrapolates this error from three different instructions given by the court: CALJIC Nos. 1.21, 3.30 and 7.50. Using CALJIC No. 1.21, the trial court defined "knowingly" as "knowledge of the existence of the facts in question." Invoking CALJIC No. 3.30, the trial court stated that in all the charges *and* their lesser included offenses, "there must exist a union or joint operation of act or conduct and general criminal intent. General criminal intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful."

Later in the instructions, the court informed the jury of the elements of each of the offenses. Using CALJIC No. 7.50, the court delineated the elements of the crime of resisting an executive officer as follows: "Every person who willfully and unlawfully attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon that officer by law, or who knowingly resists, by the use of force or violence, an executive officer in the performance of his . . . duty, is guilty of a violation of [] section 69, a crime. [¶] An 'executive officer' is a public employee whose lawful activities are in the exercise of a part of the sovereign power of the governmental entity employer, and whose duties are discretionary, in whole or in part.

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[4] In *People v. Patino, supra,* 95 Cal.App.3d at page 27, it was held that the "crime of obstructing or resisting an officer in the performance of his duties ([]§ 69) *would appear* to require an act done with the specific intent to interfere with the officer's performance of his duties." (Italics added.) Without addressing and resolving whether the crime actually mandates a specific intent, the court found substantial evidence for *whatever* the level of mens rea. (*Id.* at pp. 27-28.) Similarly, in the later case of *People v. Gutierrez* (2002) 28 Cal.4th 1083, at pages 1153-1154, the court failed to resolve that issue, finding instead that whatever level of mental intent was required as an element, the evidence in the case before it met even the highest standard.

Any employee charged with the responsibility of enforcing the law is an executive officer. [¶] In order to prove this crime, each of the following elements must be proved: [¶]1. A person knowingly and unlawfully resisted an executive officer in the performance of his [] duty; and [¶] 2. The resistance was accomplished by means of force or violence."

Lee argues that the last instruction was inadequate because the offense requires the specific intent to interfere with the officer's performance of his duties, citing *People v. Gutierrez, supra,* 28 Cal.4th at pages 1153-1154. As the court never used the talismanic term, "specific intent," the jury *might* have misconstrued these instructions, resulting in its convicting him of the crime even though the jurors never found he *specifically* intended to deter the officer from his duties. However, as emphasized in *Gutierrez,* this deletion constitutes mere harmless error in the context of circumstances *clearly* evidencing that specific intent. In *Gutierrez,* the defendant threatened "to 'take out'" a deputy sheriff who was searching his jail cell and found contraband razor blades. (*Id.* at p. 1153.) Such a threat under these circumstances, particularly in light of Gutierrez's prior conviction for assaulting a police officer with a gun, clearly reflected the necessary specific intent.

Likewise, here. The facts could not have been interpreted as reflecting a mere *general* mental state: Lee knocked the parole officer down, pummeled him almost senseless, wrenched the gun from Storay's holster and then *pulled the trigger on the officer.* There could not be a clearer example of the specific intent to *deter* an officer from the performance of his duties. (E.g., *Gutierrez, supra,* 28 Cal.4th at p. 1154 [clear evidence of specific intent when, at a traffic stop, Gutierrez pulled a gun on the officer, placed it at the back of the officer's head and pulled the trigger to prevent the officer from discovering he had kidnapped his ex-wife, killed her new boyfriend and murdered his latest girlfriend].)

Lee responds that such a review following an erroneous instruction requires an analysis of the *entire* record, *not* merely that evidence in a light most favorable to the

verdict. (See *Maupin v. Widling* (1987) 192 Cal.App.3d 568, 572-573.) In other words, we must review the instruction contention in light of the prosecution's case *and* the defense testimony. Therefore, we include in our analysis that Lee testified he merely wrenched the gun from Storay's hands and threw it away to prevent Storay from shooting him without reason. We also must weigh in that balance that Thom Helmick, a chaplain at the Rescue Mission, testified that Lee appeared frightened when he re-entered the building, and that Helmick thought *Storay* was the aggressor of the situation based on Storay's casual appearance and Lee's apparent fear on re-entry. On the other hand, Storay explained that he always wore "plain clothes" for his interviews with his parolees, thereby appearing to be a casual stranger. Moreover, Storay was severely injured, while Lee suffered no injuries at all. Lastly, Lee's comments at his arrest conclusively resolved the issue as to his intent at the time: He declared quite vividly that he should have killed the officer and that he was jubilant over having beaten his parole officer. Consideration of *all* the evidence still weighs in favor of assessing any instructional error as harmless.

The judgment is affirmed.

SILLS, P. J.

WE CONCUR:

BEDSWORTH, J.

O'LEARY, J.